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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Ft. Harrison Veterans Residence, L.P. ("Ft. Harrison"), through its counsel of record, submits the following reply in support of its Motion for Temporary Restraining Order and Preliminary Injunction.

ARGUMENT

The Court should grant Ft. Harrison's motion for preliminary injunction. By filing its motion, Ft. Harrison seeks only to protect its remedy in the underlying litigation and avoid future abuses through correcting the illegal and unfair provisions of the 2013 Qualified Allocation Plan ("QAP"). Ft. Harrison's motion does not seek to permanently enjoin the 2013 low income housing tax credit ("LIHTC") allocation program or to prevent the Board from performing its responsibilities under Montana or federal law. Rather, Ft. Harrison asks the Court to issue a

preliminary injunction to temporarily delay the process until it can adjust the 2013 QAP to ensure the LIHTCs will be allocated in a legal and fair manner.

Currently, the temporary restraining order enjoins the entire 2013 LIHTC allocation process, including the application submission deadline. Accordingly, the Court should set a new submission deadline and reject the Board's challenge to Ft. Harrison's standing. The Court has authority to issue a preliminary injunction to further prevent the Board from enforcing the unconstitutional provisions of the 2013 QAP until these matters are resolved, and § 27-19-103(4), MCA, does not bar the Court from doing so. Moreover, the Board's response fails to refute that Ft. Harrison qualifies for a preliminary injunction under three distinct statutory bases. A bond is unnecessary in this matter because the damages the Board alleges will not occur for one to two years and will likely never materialize. Finally, Ft. Harrison's challenge to the 2013 QAP does not resurrect Intervenors' mootness argument because the Board can fashion a remedy for Intervenors, as they have previously done, regardless of the outcome of the litigation. Therefore, the Court should grant Ft. Harrison's motion without requiring a bond and delay the 2013 LIHTC allocation process until the issues in this matter are resolved.

I. THE COURT SHOULD ORDER A NEW DATE FOR THE 2013 APPLICATION SUBMISSION DEADLINE AND HOLD THAT FT. HARRISON HAS STANDING TO CHALLENGE THE 2013 QAP.

Contrary to the Board's argument, the 2013 application submission deadline has not passed because it was enjoined by the temporary restraining order. The Court's Order Granting Ft. Harrison's Motion for Temporary Restraining Order and Setting Show Cause Hearing, issued January 9, 2013, states, "IT IS HEREBY ORDERED that a Temporary Restraining Order is hereby issued to Respondent restraining Respondent from conducting the low income housing tax credit allocation process for 2013, pending further order by this Court." Despite this order, the Board has publicly stated its intention "to move forward with the allocation process based upon the 2013 QAP, including the January 18, 2013 application submission deadline," if the Court denies Ft. Harrison's motion. NEWS AND UPDATES: AS OF 1/11/13, http://housing.mt.gov/About/MF/lihtcallocation.mcpx (last visited Feb. 4, 2013), attached hereto as **Exhibit A**. Despite the temporary restraining order, the Board apparently concludes that the deadline has passed because "the Court has not made any order extending the application submission deadline and there is no assurance that it will do so." *Id.*

Contrary to the Board's position, however, the "allocation process" consists of all parts of the process, including the application deadline. The Board's intended action erroneously implies that the temporary restraining order is invalid if the preliminary injunction does not issue, or if the temporary restraining order is subsequently lifted. However, the Court's order is clear. The deadline was enjoined, and any action by the Board to accept applications is prohibited. The Board is not free to choose which portions of the allocation process it will tentatively perform. To the extent the Board argues it performed these tasks, it has acted in violation of the temporary restraining order.

As a result, regardless of the Court's decision on Ft. Harrison's motion, Ft. Harrison requests the Court set a new application submission deadline to allow a reasonable time for potential applicants to apply for 2013 LIHTCs after the temporary restraining order or preliminary injunction is lifted. A new deadline will clarify that, like all parts of the 2013 LIHTC allocation process, the temporary restraining order enjoined the application deadline.

Moreover, the Court is not constrained by the Board's claim that Ft. Harrison does not have standing to bring its challenge to the 2013 QAP. The Board claims Ft. Harrison lacks standing because Ft. Harrison "failed to submit an application for 2013 [LIHTCs] and . . . failed to demonstrate that the 2013 QAP did not allow them to submit an application." Resp. Br., p. 2. This claim fails for three reasons.

First, as explained above, the 2013 application submission deadline has not passed. Since the Board's argument is based upon this false assumption, its standing argument fails.

Second, the Board offers no legal authority for its claim that Ft. Harrison lacks standing. The Board devotes only a single paragraph to the notion, which cites no legal support. The Montana Supreme Court "has repeatedly held that [it] will not consider unsupported issues or arguments," and neither should this Court. *In re Marriage of McMahon*, 2002 MT 198, ¶ 6, 311 Mont. 175, 53 P.3d 1266. No statute or rule requires a party to submit an application to challenge the validity of the 2013 QAP, and the Board's conclusory statements do not divest the Court of its ability to issue declaratory relief in this case.

Third, as set out in its brief in support of the preliminary injunction, Ft. Harrison established the reasons it is unable to file an application under the 2013 QAP as written—the 2013 QAP is unconstitutionally vague and Ft. Harrison would be harmed by the Demonstration of a Montana Presence criteria. To the extent the Court requires additional discussion of these

issues, it is set forth below. For these reasons the Court should set a new date for the 2013 application submission deadline, and reject the Board's challenge to Ft. Harrison's standing on this issue.

II. THE COURT HAS THE AUTHORITY TO GRANT FT. HARRISON'S MOTION FOR PRELIMINARY INJUNCTION.

Contrary to the Board's argument, the Court has authority to issue a preliminary injunction to prevent an agency from executing administrative rules that are contrary to the law, and § 27-19-103(4), MCA, does not prevent the Court from doing so. *Buelow v. Dep't of Revenue*, 225 Mont. 225, 231, 731 P.2d 1309, 1312 (1987). In *Buelow*, the Montana Supreme Court upheld a district court's decision to grant a preliminary injunction against the Department of Revenue. *Id.* at 231, 731 P.2d at 1313. There, the Montana Legislature passed a statute providing requirements to license video poker machines. *Id.* at 226, 731 P.2d at 1310. The Department adopted emergency administrative rules, based on its interpretation of the statute. *Id.* Based upon these rules, the Department seized a number of poker machines from their respective owners. *Id.* at 228, 731 P.2d at 1311. The district court rejected the Department's interpretation of the statute and issued an injunction preventing the Department from enforcing its administrative rules in a way that denied owners the right to use the poker machines. *Id.* The Department appealed the district court's decision, claiming in part that the Court violated § 27-19-103(4), MCA, because the injunction prevented the Department from executing the law. *Id.* at 230, 731 P.2d at 1312.

The Montana Supreme Court upheld the injunction and held that § 27-19-103(4), MCA, did not apply. *Id.* at 231, 731 P.2d 1312-13. It further held "the injunction did not violate § 27-19-103, MCA because "the Department was not executing a public statute nor was it executing a public office in a lawful manner." *Id.*

Like the district court in *Buelow*, this Court has the authority to grant Ft. Harrison's motion for preliminary injunction. Similar to the administrative rules in *Buelow*, the 2013 QAP is contrary to law because it contains unconstitutional provisions. Therefore, like the Department in *Buelow*, the Board is not executing a public statute in a lawful manner by conducting the 2013 LIHTC allocation based upon the 2013 QAP. Accordingly, the preliminary injunction Ft. Harrison seeks does not violate § 27-19-103(4), MCA.

The Court should reject the Board's analysis of § 27-19-103(4), MCA. Resp't's Resp. in Opp. to Pet'r's Mot. for Prelim. Inj., pp. 3-6 (Jan. 24, 2013) [hereinafter "Resp. Br."]. The

Board's contention that § 27-19-103(4), MCA, bars an injunction in this case hinges on its statement that "[a] regulation adopted by an agency pursuant to a delegation of rule-making authority by the legislature has the force and effect of a statute for purposes of the statutory provisions prohibiting granting an injunction to prevent execution of a public statute." *Id.* at 3-4. In support of this statement, the Board cites American Jurisprudence 2d and a California case, *Agricultural Labor Relations Board v. Superior Court*, 16 Cal. 3d 392, 401, 546 P.2d 687 (1976). These sources do not bind the Court. However, the Court is bound by the Montana Supreme Court's decision in *Buelow*, set forth above. Under *Buelow*, administrative rules do not have the same status as statutes under Montana law and do not prevent the Court from granting Ft. Harrison's motion.

Even if the Court accepts the Board's contention, however, Ft. Harrison meets the exception to the statute the Board identifies in its response. The Board states that when § 27-19-103(4), MCA, applies, the prohibition is overcome where the rule is unconstitutional or invalid and there is invasion of a property interest. Resp. Br., p. 11 (citing *Spoklie v. Dep't of Fish, Wildlife & Parks*, 2002 MT 228, ¶¶ 34-35, 311 Mont. 427, 56 P.3d 349). In its brief in support of its motion, Ft. Harrison established provisions of the 2013 QAP and the corresponding rules are unconstitutional. Supp. Pet'n, p. 8, ¶ 45; Br. in Supp. of Mot. for TRO and Prelim. Inj., pp. 12-17 (Jan. 8, 2013) [hereinafter "Br. in Supp."]. Ft. Harrison also established its interest in the 2013 LIHTC allocation as the remedy for its claims relating to 2012. *Id.* at 7-8.

It is also important to note that Ft. Harrison's motion does not seek to prevent the enforcement of a public statute. In this regard, the Board distorts the relief Ft. Harrison requests through its motion. Ft. Harrison has not asked the Court to prevent the execution of 26 U.S.C. § 42 or the Montana Housing Act of 1975, as the Board claims. Resp. Br., p. 4. Rather, Ft. Harrison asks only that these statutes be carried out in a legal and fair manner, without the use of the unconstitutional criteria currently found in the 2013 QAP. Ft. Harrison requests the Court temporarily postpone the 2013 LIHTC allocation process until these issues are resolved. The very purpose behind a preliminary injunction is "to maintain the status quo pending the final outcome of the litigation." *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 25, 348 Mont. 68, 199 P.3d 810. Considering these things, the Court has authority under Montana law to grant Ft. Harrison's motion for preliminary injunction.

III. THE COURT SHOULD GRANT FT. HARRISON'S MOTION BECAUSE THE BOARD FAILED TO REFUTE A PRELIMINARY INJUNCTION IS WARRANTED IN THIS CASE.

Ft. Harrison satisfied the requirements for a preliminary injunction on three distinct bases in its brief in support of its motion for preliminary injunction, and the Board's response fails to refute these arguments. First, the Board's own evidence and argument demonstrate Ft. Harrison will be irreparably harmed and the Court's judgment relative to the new counts of Ft. Harrison's supplemental petition will be rendered ineffectual if the Board is allowed to proceed with the 2013 LIHTC allocation process. Next, the Board's claim that the 2013 QAP is constitutional fails. Finally, the Board's argument misinterprets the lower standard for establishing Ft. Harrison is entitled to judgment in this matter. For these reasons, the Court should grant Ft. Harrison' request for preliminary injunction.

A. The Board's evidence and argument establish that Ft. Harrison will be irreparably harmed and the Court's judgment will be rendered ineffectual, if the 2013 LIHTC allocation process proceeds.

The Court should reject the Board's claim that it is "highly improbable" that allocating the 2013 LIHTCs will render the Freedoms Path Project unviable because it is "reasonable to assume" the Board will include the same Corrective Award provision in the 2014 QAP and QAPs for subsequent years. Resp. Br., p. 14. The Board's own evidence contradicts this claim, and its argument ignores numerous factors that may make the LIHTCs unavailable or insufficient in future years.

The affidavit of Bruce Brensdal, the Executive Director of the Board, establishes the irreparable injury Ft. Harrison will experience if the Board is allowed to allocate the 2013 LIHTCs. Mr. Brensdal testified that 2013 applicants that do not receive an allocation of 2013 LIHTCs will suffer severe financial loss, which may render their respective projects unviable. Brensdal Aff., p. 4, ¶¶ 19-20. He states that the applicable credit percentage rate ("APR"), which "limits the amount of [LIHTCs] that can be awarded for any particular project" is "fixed at 9% for [LIHTCs] allocated before January 1, 2014." *Id.* at 4, ¶ 18. Mr. Brensdal admits that "[f]or [LIHTCs] allocated after that date, the APR will revert to the floating APR, which was 7.38%." *Id.* at 4, ¶¶ 18-19. As a result, beginning January 1, 2014, "the maximum [LIHTC] awardable to each project would be lower, resulting in funding gaps of $300,000 to $1 million per project." *Id.* at 4, ¶ 19.

According to Mr. Brensdal, this will almost certainly cause these projects to fail. "It is difficult if not insurmountable for these projects to bridge such funding gaps, as the developers lack ready access to credit facilities and sources for such funding." *Id.* As a result, "[l]oss of the fixed 9% APR would mean that, even if awarded 2013 [LIHTCs], at least some of the 2013 developers would be unable to develop their proposed projects because of inadequate funding." *Id.* at 4, ¶ 20.

Ft. Harrison will be equally harmed if the Court permits the Board to award the 2013 LIHTCs because it is in the same position as the 2013 applicants. Like the 2013 APR, the 2012 APR, under which Ft. Harrison submitted its application, was also fixed at nine percent. *See* The Housing and Economic Recovery Act of 2008, Pub. L. 110-289 § 3002 (July 30, 2008). As a result, if Ft. Harrison does not receive an award of LIHTCs before January 1, 2014, it will be subject to the lower APR, just like the 2013 applicants. By the Board's admission, this will cause Ft. Harrison to face a nearly insurmountable funding gap, and like 2013 applicants, Ft. Harrison may be unable to develop the Freedoms Path Project.

Moreover, the Board's argument ignores other factors that may prevent Ft. Harrison from obtaining LIHTCs in 2014 or subsequent years, regardless of the outcome of the litigation. First, the Board does not control whether Montana receives LIHTCs from the Federal Government. The Board cannot guarantee that the United States Congress will not discontinue or severely limit the LIHTC program next year, especially considering the current state of the economy. In this regard, not even a Court order can ensure LIHTCs will be available to Ft. Harrison in 2014 or later. However, LIHTCs are available in 2013, and the Court has the authority to preserve them until the issues in this matter are resolved.

Second, the Board cannot guarantee that the 2014 QAP will include a Corrective Award provision. The Court should reject the Board's claim that if Ft. Harrison does not receive LIHTCs in 2013, "staff will recommend and it is reasonable to assume that the Board will include the same Corrective Award provision in the 2014 and subsequent year QAPs." Resp. Br., p. 7; Brensdal Aff., p. 3, ¶ 14. This statement offers no certainty as to what the 2014 QAP will contain. Despite his current position, Mr. Brensdal's statement does not bind future staff. More importantly, Mr. Brensdal cannot guarantee that the Board will incorporate a Corrective Award provision in the 2014 QAP. Mr. Brensdal holds no authority over the Board, and the Board has taken the position on numerous occasions that it is not bound by the staff's

recommendations. *See, e.g.*, Resp't's Reply Br. in Supp. of Mot. to Dismiss or in the Alt., Mot. for Summ. J., pp. 4-5; Aff. of Mary Bair, p. 4, ¶ 11. In fact, even the Board does not have absolute control over the contents of the 2014 QAP. As explained in Ft. Harrison's brief in support, the Montana Governor must also approve the QAP before it can be formally incorporated for use through rulemaking procedure. Br. in Supp., p. 10; s*ee also* 2013 QAP, p. 1. For these reasons, an LIHTC award in 2014 or later may not be available.

The Board's response also ignores numerous other considerations that render an award in 2014 insufficient. First, allowing the Board to allocate the 2013 LIHTCs risks losing the lease of the land Ft. Harrison intends to use for the Freedoms Path Project. The Board claims Ft. Harrison has "offered no evidence that the VA is contemplating exercising this termination provision or that allowing the 2013 allocation process to go forward would cause the VA to do so." Resp. Br., p. 14. However, the Enhanced-Use lease, which is attached as Exhibit A to Ft. Harrision's brief in support of its motion, lists the "Milestone Schedule for the Project." Step K requires that the parties make a "Joint Determination of Whether this Enhanced-Use Lease is Viable or Not" by December 31, 2012. Obviously, this date has already passed. Considering Mr. Brensdal's comments that applicants who do not receive LIHTCs in 2013 will face nearly insurmountable funding gaps, waiting another year for an LIHTC award creates a much greater risk the VA will cancel the lease.

In addition, the delay harms the homeless and disabled veterans the Freedoms Path Project is intended to assist. Each day the Board delays the LIHTC award to Ft. Harrison, this assistance is denied.

These things demonstrate that if the Court allows the Board to conduct the 2013 LIHTC allocation process, Ft. Harrison will be irreparably harmed and the Court's judgment will become ineffectual. Accordingly, the Court should reject the Board's arguments and grant Ft. Harrison's motion on this basis.

B. The Board has failed to refute Ft. Harrison's argument that the provisions of the 2013 QAP violate Ft. Harrison's constitutional rights.

In its brief in support of its motion, Ft. Harrison established the 2013 QAP violates Ft. Harrison's rights because provisions of the 2013 QAP violate the Dormant Commerce Clause and are unconstitutionally vague. The Court should reject the Board's argument regarding the Demonstration of a Montana Presence Criteria that "[i]t is not the Court's role to substitute its judgment for that of the Board with respect to such matters by trying the factual basis for the

Board's determination." Resp. Br., p. 8. This argument misstates Ft. Harrison's request and elevates the Board above the Court's authority.

Ft. Harrison has asked the Court to facially review the Demonstration of a Montana Presence criteria, not to substitute its judgment for that of the Board. As part of this test, the Court is entitled to review the purpose of the provisions at issue to determine whether they can be served by nondiscriminatory means. The well established test for whether the provisions facially violate the Dormant Commerce Clause is a two-step process. The initial question is whether the provisions "regulate[] evenhandedly with only incidental effects on interstate commerce, or discriminate[] against interstate commerce." *Oregon Waste Systems, Inc. v. Dep't of Env. Quality of Ore.*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). If the Court finds the provisions are facially discriminatory, they are subject to a "virtually per se rule of invalidity," and must be invalidated unless the state can show the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). The Board's argument attempts to prevent the Court from examining these provisions and lies in direct contrast to the second prong of the test. Accordingly, the Court should reject the Board's argument on this issue.

Likewise, the Board's argument that these provisions are acceptable because "[s]uch experience is not determinative, but is merely one of many considerations" fails as a matter of law. Resp. Br., p. 8. Unconstitutional provisions must be invalidated regardless of how far their effects may reach. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (" . . . [W]here discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *see also Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.") The number of considerations in the 2013 QAP does not operate to justify the unconstitutional provisions it contains.

The Court should also find the 2013 QAP is unconstitutionally vague. The Board and Intervenors claim that the 2013 QAP is sufficiently clear is not supported by the language in the 2013 QAP. This argument ignores the vague elements of the scoring criteria that prevented Ft. Harrison from filing an application for LIHTCs in 2013.

As stated in Ft. Harrison's brief in support of its motion, numerous provisions of the 2013 QAP are unconstitutionally vague. Br. in Supp., p. 15. For example, evaluation criteria no. 4, Housing Needs Characteristics, awards six points for "[a]ppropriateness of size of development" but does not indicate what criteria will be used to determine if the size is appropriate. 2013 QAP, p. 21. The criteria also awards four points for "[a]ppropriateness of market (rehab versus new construction, for example)." Although this criterion offers one measure of appropriateness, it states other measures may be used and fails to indicate what they may be. *Id.*

Likewise, evaluation criteria no. 12, Intermediary Costs, states that "[d]evelopments with the lowest percentage of intermediary costs will be compared with other applications in the same round of competition" but does not state how points will be awarded once the comparison is complete. *Id.* at 25. It also states that "intermediary costs include development fees and fees for attorneys, consultants, architects, etc." *Id.* This leaves the category open to include costs undisclosed to the applicants. *Id.*

Evaluation criteria no. 13, Developer Knowledge and Responsiveness, can result in an applicant losing up to 20 points. *Id.* However, this deduction is permissive, not mandatory. The provision states applicants "may be assigned negative points," but does not explain when the Board will exercise this authority. *Id.* In addition, the criteria does not give any indication as to how many points may be deducted for each category listed. *Id.* Also, the categories are a nonexclusive list, which may include additional undisclosed deductions. *Id.* Finally, the individual categories themselves are vague. Points may be deducted if the applicant "[h]as not been trained in a certified compliance training program," but there is no indication of who must certify the program or what facet of the development process the compliance relates to. *Id.*

These examples, which are only a portion of the many examples that will be presented when Ft. Harrison files its brief in support of its supplemental petition, meet the standard for unconstitutional vagueness. Without additional information, an applicant is left to guess at what measures the Board will use to determine whether the proposed project is the appropriate size or appropriate for the market. The applicant must guess at what the Board will consider intermediary costs, how the costs will compare to other applicants, and how the Board will allocate the points, regardless of where the applicant ranks. The applicant must also guess whether the Board will choose to deduct points from his total score, what criteria will be used to justify the deduction, what the criteria mean, and how many points will be deducted. These, and

other similar questions, prevent Ft. Harrison from properly applying for LIHTCs during the 2013 allocation process.

The Court should disregard the Board's claim that these provisions can be reasonably interpreted by the applicants. The Board criticizes Ft. Harrison, calling its arguments absurd and claiming these are "terms of common usage" that can be understood by a person of common intelligence. Resp. Br., pp. 9-10. In support, the Board cites *Wing v. Department of Transportation*, 2007 MT 72, 336 Mont. 423, 155 P.3d 1224. However, this case is distinct from *Wing*. In *Wing*, the Montana Supreme Court held that alleged confusion over the word "receipt" did not render a statute unconstitutionally vague. *Id.* ¶ 15. The statute at issue required a claimant to "present" a claim to the State before the claimant could file an action in district court. *Id.* ¶ 13. The statute also tolled the statute of limitations on claims against the state for 120 days following the State's "receipt of the claim." *Id.* The claimant argued a person of ordinary intelligence would not know whether the statute of limitations tolls from the time the claim was presented to the State or when the State actually received the claim. *Id.* ¶ 11. The Montana Supreme Court held that "a person of average intelligence could comprehend that the term receipt . . . means that the statute of limitations tolls when the Department actually receives the claim." *Id.* ¶ 13. As a result, it found that a person of common intelligence was not required to guess at when the tolling period commences and held the statute was not unconstitutionally vague. *Id.* ¶ 15.

The statute in *Wing* does not approach the level or type of vagueness exhibited in the 2013 QAP. Unlike the statute in *Wing*, the vagueness in the 2013 QAP is pervasive. The examples above provide only a portion of the overall vagueness of the document. The statute in *Wing* concerned the meaning of a single term, which the Court found to be clear. In contrast, the 2013 QAP is vague not only in the language it includes, but in the language it omits. Additional explanations and details are essential for applicants to properly understand how the applications will be scored. Terms such as "other relevant factors" and the lack of clear criteria for determining the "appropriateness" of the project cannot be understood without further explanation.

This is best illustrated by the Board's own argument. The Board claims the pending litigation and participating in the 2012 allocation process put Ft. Harrison on "actual notice of the meaning of these provisions." Resp. Br., p. 12. However, if participating in the allocation

process and subsequent litigation are required to understand what the criteria in the 2013 QAP actually requires, the QAP is not adequately clear. Accordingly, the Court should reject the Board's argument and grant Ft. Harrison's motion on this basis.

C. The Board's argument misinterprets the reduced standard to establish that Ft. Harrison is entitled to the relief demanded.

An injunction may be issued under § 27-19-201(1), MCA, "when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." The Montana Supreme Court has clarified that this standard is lower than that required to prevail on the merits of the case. "It is not necessary that the court be satisfied that the plaintiff will certainly prevail on the final hearing; a probable right, and a probable danger that such right will be defeated without the special interposition of the court, is all that need be shown." *Boyer v. Karagacin*, 178 Mont. 26, 33, 582 P.2d 1173, 1177-78, *overruled on other grounds by Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912. Ft. Harrison has met this requirement through its brief in support of its motion.

Accordingly, the Court should reject the Board's argument to the contrary. The Board offers only a single sentence to claim Ft. Harrison is not entitled to a preliminary injunction on this basis. It states, "[b]ased upon the Board's previous submissions to the Court on these issues, the Board submits that [Ft. Harrison] has not demonstrated a likelihood or probability of success of the merits of its 2012 claims." Resp. Br., p. 7. However, for purposes of a preliminary injunction, the Court is not required to make a final determination based upon the overall submissions of the parties. Ft. Harrison must simply demonstrate a probable right and probable danger. Therefore, the Court should disregard the Board's claim and grant Ft. Harrison's motion on this basis.

IV. THE COURT SHOULD NOT REQUIRE A BOND BECAUSE THE ALLEGED HARM WILL NOT ARISE IN THE TIMEFRAME FT. HARRISON REQUESTS FOR THE PRELIMINARY INJUNCTION.

The Board claims the Court should require a bond because the Board and the 2013 applicants will incur damages if a preliminary injunction is issued. Resp. Br., p. 19. The Board claims it will lose application, reservation, and compliance fees if it is unable to allocate the 2013 LIHTCs. *Id.* at 16. It also claims "the 2013 applicants would lose their substantial financial investment in developing the projects to the application stage." *Id.* at 17. These claims fail

because there is no indication this harm will materialize during the duration of the preliminary injunction and the applicants are not entitled to recover their costs at this point in the process.

The Board's damages are illusory at this point in the litigation and will likely never materialize. By the Board's own admission, the damages to the Board will not occur for at least two years. The Board loses its ability to allocate the 2013 LIHTCs only "[i]f delay from a preliminary injunction prevents 2013 [LIHTCs] from being allocated before the end of 2014." Id. at 16 (citing Brensdal Aff., p. 3-4, ¶ 16). However, even at that that time, the 2013 LIHTCs are lost only if the Board first allocates the LIHTCs from 2014 or a subsequent year. *Id.* Ft. Harrison has asked the Court for a preliminary injunction only until this matter is resolved. Mot. for Temp. Restraining Order and Prelim. Inj., p. 2. There is no indication that the Court's decision will take two years to issue. Both parties have already moved for summary judgment on the underlying case, and a hearing is already scheduled. All that remains for argument are the issues raised in the supplemental brief. Even if the litigation were to extend past the end of 2014, the Board can preserve the LIHTCs by postponing future allocations.

The same is true regarding the alleged damages to the 2013 applicants. First, this alleged loss assumes that the applicants' projects will necessarily be cancelled, which the Board has not established. Next, the preliminary injunction does not subject the applicants to any greater risk than they already face through the LIHTC allocation process. The Board admits "applicants are not guaranteed recovery of their development costs." *Id.* at 17 (citing Brensdal Aff., p. 5, ¶ 20). Moreover, the Board has repeatedly argued that applicants have no property interest in the allocation of LIHTCs. Resp. Br., p. 6 (citing *Barrington Cove LP v. R.I. Housing and Mortgage Fin. Corp.*, 246 F.3d 1, 5-6 (1st Cir. 2001) ("As demonstrated in previous briefing in this action, [Ft. Harrison] has no property interest in an award of [LIHTCs], even if were (sic) to submit the highest scoring application.") However, the Board now appears to take the opposite position in an attempt to support its most recent arguments. The Court must reject this double speak.

The damages applicants claim from the "floating LIHTC interest rate" or APR also fail. The applicants claim that if they become subject to the floating APR rather than the fixed nine percent rate, they will lose varying amounts of funding. However, as explained above, the nine percent APR is guaranteed for all LIHTC allocations made before January 1, 2014, and there is no indication the Court's decision will take an entire year to issue. Therefore, the Court should not consider these damages.

Moreover, these applicants applied for 2013 LIHTCs despite being aware, or despite the fact they should have been aware, of the ongoing litigation. In addition, Ft. Harrison made oral comments opposing the 2013 QAP in a public meeting on October 15, 2012, and written comments opposing the 2013 QAP, on December 6, 2012. The Board publicly responded to these comments when it adopted the 2013 QAP on December 20, 2012. Ft. Harrison also filed its supplemental complaint on January 8, 2013, ten days before the application deadline was originally set. The 2013 applicants applied with knowledge of these risks.

Finally, the Court should not be persuaded by Intervenors' argument that applicants will be damaged because they may have to postpone closing dates for their projects if the preliminary injunction is issued. The Court is not constrained by the applicants' closing dates. Even if some of the 2013 applicants are required to change closing dates for their respective projects to accommodate the Court's decision, this sometimes happens when litigation is pending. The 2013 applicants are sophisticated entities and should understand these risks. Considering these things, the Court should waive the bond requirement or reduce the amount of the bond to zero.

V. INTERVENORS' MOOTNESS CLAIM IS PREMATURE AND MERITLESS.

The Court should reject Intervenors' contention that Ft. Harrison's challenge to the 2013 QAP makes it impossible for the Court to "restore the parties to their original positions" and therefore Ft. Harrison's "challenge to the 2012 awards is moot." Intervenors' Resp. Br., p. 2.

As an initial matter, Intervenors' argument is premature. The Court has not made a decision, or even heard argument, regarding Ft. Harrison's challenge to the 2013 QAP. Until that time, all provisions of the 2013 QAP, including the Corrective Award provision, remain in effect, and the Intervenors' position is not disturbed. As a result, the Court cannot properly rule on whether the matter is moot at this time.

Moreover, Ft. Harrison's supplemental petition does not destroy the Court's ability to grant effective relief in this matter as Intervenors claim. This argument has been resolved in the past and, for this reason, fails here. As the Board has demonstrated with the 2012 LIHTC allocation dispute, it is able to fashion remedies for the applicants regardless of what occurs in litigation. The Board and Intervenors claimed the same mootness argument at the beginning of the litigation surrounding the 2012 LIHTC allocation. *See* Rep't's Br. in Supp. of Mot. to Dismiss; Intervenors' Reply Br. in Support of Resp't's Mot. to Dismiss. Both claimed the Court was "unable to grant effective relief or to restore the parties to their original position." Rep't's

Br. in Supp. of Mot. to Dismiss, p. 9. However, the Board then adjusted the QAP, correcting the issue for the Intervenors, and both parties abandoned the mootness argument at the oral hearing. The Board retains that same authority today, and there is nothing to indicate it cannot fashion another remedy if so required. In this respect, it is the Board's ability to exercise its rulemaking power, not the past exercise of that power, that renders Intervenors' claim invalid. Accordingly, the Court should reject Intervenors' mootness argument.

CONCLUSION

For the foregoing reasons, Ft. Harrison respectfully requests the Court grant it motion for preliminary injunction.

Dated this 4th day of February, 2013.

CROWLEY FLECK PLLP

for Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, D. Wiley Barker, hereby certify that on the 4th day of February, 2013, I had mailed via U.S. mail, a true and correct copy of the foregoing to the following:

Greg Gould
Luxan & Murfitt, PLLP
Montana Club Building
24 West Sixth Avenue, 4th Floor
P.O. Box 1144
Helena, MT 59624-1144

Oliver H. Goe
G. Andrew Adamek
Browning, Kaleczyc, Berry & Hoven, PC
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624-1697

CROWLEY FLECK PLLP

EXHIBIT
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Board of Housing

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News and Updates: as of 01/11/13

~~To Potential Applicants for 2013 Low Income Housing Tax Credits and Other Interested Parties~~:

This is to inform you of developments that may affect the 2013 LIHTC allocation process.

Ft. Harrison Veteran's Residence (FHVR) previously filed a lawsuit against MBOH challenging the 2012 LIHTC allocation. On January 8, 2013, FHVR filed an Amended Petition alleging that the 2013 QAP is invalid and requesting a Preliminary Injunction postponing the 2013 LIHTC allocation process until the Court issues a final ruling in the pending lawsuit. On January 9, 2013, the Court issued a Temporary Restraining Order (TRO) restraining the Board from conducting the 2013 LIHTC allocation process, pending further order from the Court, and set a hearing for January 28, 2013 for the Board to show why a Preliminary Injunction should not be issued to postpone the 2013 LIHTC allocation process until the Court issues a final ruling in the pending lawsuit (see attached copy of the ~~Court's Order~~). The Court hearing is open to the public.

The Court has temporarily restrained the Board from proceeding with the 2013 allocation process, at least until the Court can hold a hearing to decide whether the 2013 allocation should be postponed. The Board opposes FHVR's request for a preliminary injunction and will seek to have the TRO lifted. Although the Board cannot move forward with the allocation process while the TRO remains in effect, the Court has not yet made any determination regarding the validity of the 2013 QAP.

In the event that the Court denies FHVR's preliminary injunction request and lifts the TRO, the Board expects to move forward with the allocation process based upon the 2013 QAP, including the January 18, 2013 application submission deadline specified in the adopted 2013 QAP. To date, the Court has not made any order extending the application submission deadline and there is no assurance that it will do so. The Board cannot

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Homebuyers, Homeowners,Renters Special Needs


Rental Developers, Owners, Managers, Landlords


Lenders, Servicers, Builders, Real Estate Agents


Local Government and Nonprofits


Forms and Resources

Housing Division

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301 S Park Ave Room 240
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Helena MT 59620-0528

Phone/FAX
Phone: 406.841.2840
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Toll Free: 800.761.6264

~~**Email Housing Division**~~

assure that applications received after the January 18, 2013 application submission deadline will be considered for an award of 2013 LIHTCs.

While the TRO or any similar order remains in effect, Board staff will provide general information regarding the process as specified in the adopted 2013 QAP. However, in observance of the TRO, Board staff will not evaluate, score, review or otherwise process any 2013 applications or application materials until and unless permitted to do so by further order of the Court.

The Board will hold any 2013 LIHTC applications and application fees submitted, pending a determination from the Court regarding the 2013 allocation process. If it is determined at any time that the 2013 allocation process will not be based upon these application submissions, the applications and associated application fees will be returned and refunded to the respective applicants. Further direction regarding the 2013 LIHTC allocation process will be provided based upon further orders of the Court.

If you have any questions regarding the 2013 LIHTC allocation process, please contact Mary Bair.

~~**2013 QAP as approved by Governor**~~

Other training opportunites around the State
~~http://housing.mt.gov/confandtraining.mcpx~~

Low Income Housing Tax Credits Training Opportunities

~~2012 Low Income Housing Tax Credits Awarded~~

~~2011 Low Income Housing Tax Credits Awarded~~

This document contains:

- A summary of all requested amounts and those funded
- Detailed information about each project that applied for credits

2013 Credit Authority is $2,590,000.00, maximum award will be $647,500.00

~~3 year average cost as follows:~~

Cost per unit: $182,855.31

Cost per square foot: $185.98

Credit per square foot: $17.33

~~2013 QAP~~

~~2012 QAP~~

~~2011 QAP - Amended November 15, 2010~~

~~2010 QAP~~

~~2011 High Cost Areas~~ *Remain the same for 2012*

~~2013 Income and Rent Limits~~ *Effective 12/11/12*

~~2012 Income and Rent Limits~~

~~2009 Tax Credit Allocations plus Exchange and Assistance Funding~~

~~1990 - 2010 Tax Credit Projects~~

~~2012-2013 Utility Allowances by Region~~ *updated 11/16/12*

~~Montana DOE Status of State Energy Codes~~

~~Montana Additional State Energy Code Information~~

Tax Credit Supplement:

~~Tax Credit Supplement Form and Instructions~~

~~Supplement Certification~~

For Information regarding the Uniform Application please see ~~Uniform Application Process~~.